

EXHIBIT 36

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON
3 AT SEATTLE
4

5 MICROSOFT CORPORATION, a

6 Washington corporation,

7 Plaintiff,

8 vs. No. C10-1823-JLR

9 MOTOROLA, INC., MOTOROLA

10 MOBILITY, INC., and GENERAL

11 INSTRUMENT CORPORATION,

12 Defendants.
13 _____

14
15 DEPOSITION OF DAVID A. HEINER

16 Taken on behalf of the Defendants

17 March 28, 2012

18 - - -

19 BE IT REMEMBERED THAT, pursuant to the Washington Rules of
20 Civil Procedure, the deposition of DAVID A. HEINER, was
21 taken before Tia B. Reidt, #2798, a Certified Shorthand
22 Reporter, and a Notary Public for the State of Washington,
23 on March 28, 2012, commencing at the hour of 8:48 a.m., the
24 proceedings being reported at 315 5th Avenue South,
25 Suite 1000, Seattle, Washington. TSG Job # 47848.

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1	APPEARANCES	1	Appearing on behalf of the Defendant
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3	EXAMINATION BY PAGE	3	Exhibit 8 1-page Google/Motorola Mobility Q1 49
4	Mr. Schoenhard 8	4	Questionnaire to competitors.
5		5	Exhibit 9 22-page 802.11 Patent License 53
6	EXHIBIT INDEX	6	dated October 21, 2010.
7		7	Exhibit 10 24-page H.264 Patent License dated 53
8	EXHIBIT NO. DESCRIPTION PAGE	8	10/29/2010.
9	Exhibit 1 10-page Defendant Motorola Mobility, 12	9	Exhibit 11 3-page Interoperability: The other 54
10	Inc.'s notice of deposition of	10	Side of Our Settlement with
11	Microsoft Corporation.	11	the European Commission document.
12	Exhibit 2 17-page letter re: Patent Standards 27	12	Exhibit 12 4-page Frequently Asked Questions 55
13	Workshop, Project No. P11-1204,	13	about Interoperability document.
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18	Microsoft statement.	18	Exhibit 15 21-page Patent Covenant Agreement, 60
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<p>1 DAVID A. HEINER</p> <p>2 representing Microsoft and the witness.</p> <p>3 THE VIDEOGRAPHER: Will the court reporter please</p> <p>4 swear the witness in.</p> <p>5 DAVID A. HEINER, having been first duly sworn, was</p> <p>6 examined and testified as follows:</p> <p>7</p> <p>8 EXAMINATION</p> <p>9 BY MR. SCHOENHARD:</p> <p>10 Q. Good morning, Mr. Heiner.</p> <p>11 A. Good morning.</p> <p>12 Q. Please state your full name and home address for</p> <p>13 the record.</p> <p>14 A. David A. Heiner, 14314 227th Avenue Northeast,</p> <p>15 Woodinville, Washington, 98077.</p> <p>16 Q. And do you understand that you're testifying under</p> <p>17 oath here today?</p> <p>18 A. I do.</p> <p>19 Q. Is there any reason you won't be able to provide</p> <p>20 honest testimony today?</p> <p>21 A. No.</p> <p>22 Q. You are currently employed by Microsoft?</p> <p>23 A. Yes.</p> <p>24 Q. What is your current title?</p> <p>25 A. Vice president and deputy general counsel.</p>	<p>1 DAVID A. HEINER</p> <p>2 Q. What are your responsibilities as vice president</p> <p>3 and deputy general counsel?</p> <p>4 A. I'm responsible for two organizations within the</p> <p>5 Microsoft law department. One is our antitrust group, and</p> <p>6 the other is the corporate standards group.</p> <p>7 Q. Do I understand correctly, based on your answer,</p> <p>8 that the antitrust group and the corporate standards groups</p> <p>9 are treated as two separate groups?</p> <p>10 A. They're often treated as one group, so it's --</p> <p>11 there's no real answer. It could be one or two.</p> <p>12 Q. But you have general responsibility for both?</p> <p>13 A. I do.</p> <p>14 Q. Could you please explain briefly what your</p> <p>15 standards -- what your responsibilities are with respect to</p> <p>16 the standards group?</p> <p>17 A. Well, I oversee the group. The corporate</p> <p>18 standards group is an organization that provides services to</p> <p>19 the rest of Microsoft. Those services include legal advice</p> <p>20 in connection with participation in standards bodies,</p> <p>21 standards policy work, and also includes people who</p> <p>22 participate directly in standards-setting organizations, so</p> <p>23 these are nonlawyers whose job function is to represent</p> <p>24 Microsoft at standards bodies.</p> <p>25 There are other people within Microsoft who are not</p>

<p style="text-align: right;">Page 30</p> <p>1 DAVID A. HEINER</p> <p>2 the second paragraph on Page 12 of Exhibit 2.</p> <p>3 A. Okay. (Witness peruses document.)</p> <p>4 Okay.</p> <p>5 Q. Is it fair to say that Microsoft believes that</p> <p>6 while there is no exhaustive list of traditional RAND</p> <p>7 licensing terms, in addition to a possible compensation</p> <p>8 element, such terms may include a field of use restriction,</p> <p>9 reciprocity, non sublicensability, defensive suspension, and</p> <p>10 other common patent licensing considerations?</p> <p>11 A. Yeah. Generally I think that's correct.</p> <p>12 As I think about one of the earlier questions you</p> <p>13 asked, though, maybe I should clarify one aspect. This is</p> <p>14 my letter to the Federal Trade Commission, and it was my</p> <p>15 view at the time. I am responsible for this function at</p> <p>16 Microsoft. But to go all the way to say that, you know,</p> <p>17 does Microsoft believe X, Y and Z is perhaps a bit of a</p> <p>18 stretch, since it's a corporate entity and there's not</p> <p>19 necessarily any one belief of such an entity.</p> <p>20 But having said that, I am responsible for the</p> <p>21 subject matter generally, and so...</p> <p>22 Q. And you do agree that Exhibit 2, the June 2011</p> <p>23 letter, was submitted to the Federal Trade Commission on</p> <p>24 behalf of Microsoft, the corporate entity?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 31</p> <p>1 DAVID A. HEINER</p> <p>2 Q. Can you explain what you understand the term</p> <p>3 "field of use restriction" to mean?</p> <p>4 A. I'm sorry. Can you repeat the question?</p> <p>5 Q. Can you explain to me what you understand the term</p> <p>6 "field of use restriction" to mean.</p> <p>7 A. I understand the term "field of use restriction"</p> <p>8 to mean that a particular, say, patent might be licensed for</p> <p>9 one use and not another.</p> <p>10 Q. Can you explain to me what you understand the term</p> <p>11 "reciprocity" to mean?</p> <p>12 A. Let's see. I understand that term to mean that in</p> <p>13 a patent license, there might be a reciprocal grant of</p> <p>14 patent rights back to the licensor.</p> <p>15 Q. Would that also be referred to as a grant-back?</p> <p>16 A. I think so. I'm not sure if the terms are, you</p> <p>17 know, completely synonymous or not, but yes.</p> <p>18 Q. What do you understand the term "defensive</p> <p>19 suspension" to mean?</p> <p>20 A. I understand that to refer to the concept where a</p> <p>21 patent holder might grant a patent license to a licensee but</p> <p>22 have a provision that says that if the licensee engages in</p> <p>23 some specified act such as a lawsuit back against the</p> <p>24 licensor, then the license grant terminates.</p> <p>25 Q. And what might other common patent licensing</p>
<p style="text-align: right;">Page 32</p> <p>1 DAVID A. HEINER</p> <p>2 considerations include?</p> <p>3 A. I don't know offhand.</p> <p>4 Q. Would licensing nonessential patents as part of</p> <p>5 the same transaction be a common patent licensing</p> <p>6 consideration?</p> <p>7 A. Can you repeat the question?</p> <p>8 Q. Would including as part of license discussion</p> <p>9 nonessential patents also be another common patent licensing</p> <p>10 consideration?</p> <p>11 A. Yes. I think that happens.</p> <p>12 Q. Would considerations of license term and</p> <p>13 termination also be common patent license considerations?</p> <p>14 A. Yes.</p> <p>15 Q. And each of these considerations would typically</p> <p>16 be fleshed out as part of bilateral negotiations between the</p> <p>17 perspective licensor and perspective licensee, correct?</p> <p>18 A. Yes.</p> <p>19 Q. Would you agree that whether terms are reasonable</p> <p>20 can be a matter of some debate?</p> <p>21 A. Yes.</p> <p>22 Q. And whether terms are reasonable can be resolved</p> <p>23 through litigation in the relatively rare circumstances</p> <p>24 where business discussions fail, correct?</p> <p>25 A. I think that's right.</p>	<p style="text-align: right;">Page 33</p> <p>1 DAVID A. HEINER</p> <p>2 Q. You would typically expect for there to be</p> <p>3 business discussions prior to legal action, however,</p> <p>4 correct?</p> <p>5 A. I don't know about that.</p> <p>6 Q. You agree that RAND license terms are typically</p> <p>7 arrived at through bilateral negotiation, correct?</p> <p>8 A. Typically, yes.</p> <p>9 Q. Are there circumstances in which bilateral</p> <p>10 negotiation would not be involved?</p> <p>11 MR. HARRIGAN: Object to the form of the question.</p> <p>12 You can answer.</p> <p>13 THE WITNESS: I think one important aspect of the</p> <p>14 standards system is that a firm that makes a RAND commitment</p> <p>15 when it initiates patent licensing discussions, that it do</p> <p>16 so in good faith and that any offer it makes that it</p> <p>17 believes that offer is RAND, recognizing that people may</p> <p>18 differ on that point.</p> <p>19 And so if a firm were to come forward and put on</p> <p>20 the table an offer that is manifestly not RAND, that likely</p> <p>21 would not provide the basis for good-faith negotiations to</p> <p>22 proceed.</p> <p>23 BY MR. SCHOENHARD:</p> <p>24 Q. How might you determine if an offer is manifestly</p> <p>25 not RAND?</p>

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A. If it had the characteristics that Microsoft identified in an interrogatory response, I think in this case but I'm not sure, where we listed a number of aspects of what, is in our view, not RAND.

Q. In such a circumstance, you believe that rather than going back and saying this doesn't look quite right in the general standards-setting context, it makes sense to go ahead with a legal action?

A. I think that's fair to say.

Q. Please direct your attention to Page 13 of Exhibit 2, the June 2011 letter.

A. Okay.

Q. Please feel free to read to yourself the first full paragraph on this page.

MR. HARRIGAN: I'm sorry. I was typing and missed it. Where are we reading?

MR. SCHOENHARD: Page 13, the first full paragraph.

MR. HARRIGAN: Thanks.

THE WITNESS: (Witness peruses document.)

Okay.

BY MR. SCHOENHARD:

Q. Is it fair to say that as of June 2011, the time this letter was submitted to the Federal Trade Commission, you believed that the existence of a RAND commitment to

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offer patent licences should not preclude a patent holder from seeking a preliminary injunctive relief or commencing an action in the International Trade Commission just because the patent holder has made a licensing commitment to offer RAND-based licenses in connection with the standard?

A. Yes.

Q. And would you agree that any uniform declaration that such relief would not be available if the patent holder has made a commitment to offer a RAND license for its essential patent claims in connection with the standard may reduce any incentives that implementers might have to engage in good-faith negotiations with the patent holder?

A. Yes. I mean, generally I believe that, and I think it's a commonplace notion, that anytime there's any limit whatsoever on the scope of intellectual property rights, that logically tends to reduce incentives to attain those rights.

And on the other hand, if what's happening is that there's greater sharing of those rights, then in the near term there's the possibility of greater enervation by others using those rights, and that's kind of a balancing and tradeoff that has to be made.

Q. Please direct your attention to Page 8 of Exhibit 2, the June 2011 letter to the Federal Trade

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Commission.

A. (Witness complies.)

Q. In Footnote 5 on Page 8 of Exhibit 2, do you see reference to a Mr. Keith Mallinson, M-A-L-L-I-N-S-O-N?

A. Yes.

Q. Who is Mr. Keith Mallinson?

A. I don't know beyond what is said in the parenthetical.

Q. The parenthetical to which you're referring reads, "A longstanding research analyst and consultant in the telecommunications industry"?

A. Yes.

Q. Do you believe that statement regarding Mr. Mallinson to be correct?

A. Let me take a minute and read this. We're talking about the statement that's the second sentence of the footnote, or after the colon?

Q. I was referring to the statement in the parenthetical referring to who Mr. Mallinson is.

A. Oh. I assume that's correct. I don't know personally.

Q. Please take a moment to read to yourself the final paragraph of Footnote 5 on Page 8 of Exhibit 2.

A. Okay. (Witness complies.)

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MR. HARRIGAN: When you say "the final paragraph," you're talking about the one that starts, "The principal"?

MR. SCHOENHARD: Correct.

MR. HARRIGAN: Feel free to read the rest of that footnote.

THE WITNESS: (Witness peruses document.)

Okay.

BY MR. SCHOENHARD:

Q. Do you agree with Mr. Mallinson's statement that there will at times be significant contention between the patent owner and implementer about what constitutes reasonable licensing terms, but this is to be expected, as with commercial negotiation on any input cost component, and has for the most part been readily resolved through bilateral negotiations?

A. Yes.

Q. Would you agree, then, that even in situations where there may be significant contention between parties as to what would ultimately be reasonable terms, bilateral negotiation is an appropriate course?

A. In general, yes. This particular case I think of as an outlier.

Q. If a potential implementer of a standard is aware that another entity owns a portfolio of potentially

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standard-essential patents, do you believe that the implementer has an obligation to seek a license to those patents?

A. I don't know about that. The current practice in the industry is often that no such license is sought and so no such license is put in place, but rather firms simply implement standards and rely on the fact that if they needed a license - in other words, if the patent holder came knocking - there's a RAND commitment.

And so I think often in the industry, firms simply implement and don't actually obtain licences from everyone who might have IP that reads on implementation.

Q. Does that practice create free-rider issues?

A. What do you mean?

Q. Doesn't that type of practice encourage implementers to effectively operate in an unlicensed capacity with respect to existing IP rights in the hopes that never shall a license need to be paid?

A. I don't know. I'm just commenting on what I think happens in the industry.

Q. When a patent holder comes knocking on the implementer's door, what do you believe to be the common practice?

A. The common practice is that the patent holder, if

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he's knocking on someone's door, apparently is seeking licensing fees and then is obliged to offer a license that is compliant with RAND.

Q. How do you determine if the license that's offered is compliant with RAND?

A. Well, that's a very big question, and people go to conferences and have debates about what is RAND and the like, so there's no definitive answer to that.

Q. In large part, the parties collectively and bilaterally determine what is RAND in their specific contexts through negotiations, correct?

A. Typically.

MR. SCHOENHARD: I think I've had you on the record for approximately an hour. Why don't we go ahead and take our first break, and then we'll resume in a few moments.

THE VIDEOGRAPHER: The time is approximately 9:35 a.m. We are off the record.

(Pause in the proceedings.)

THE VIDEOGRAPHER: We are back on the record. The time is approximately 9:54 a.m.

BY MR. SCHOENHARD:

Q. Mr. Heiner, do you understand that you've been designated to testify today additionally with respect to Topic 36 in Motorola's Notice of Deposition --

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A. Yes.

Q. -- relating to a February 8th, 2012 statement, "Microsoft Support for Industry Standards"?

A. Yes.

Q. Do you believe that you are prepared today to speak with respect to that topic?

A. Yes.

(Whereupon, a 1-page Microsoft's Support for Industry Standards document was marked Exhibit 3 for identification.)

THE COURT REPORTER: Exhibit 3.

BY MR. SCHOENHARD:

Q. Mr. Heiner, you have been handed a document that has been marked as Heiner Exhibit 3, bearing Production No. MS-MOTO_1823_00005196256.

Please take a moment to review this document and tell me whether you recognize it.

A. Yes, I recognize this document.

Q. What is this document, Heiner Exhibit 3?

A. This document is a printout of a web page where Microsoft made a statement regarding its support for industry standards.

Q. As part of this February 8th, 2012 statement, Microsoft stated, under the No. 2, "This means that

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Microsoft will not seek an injunction or exclusion order against any firm on the basis of those essential patents," correct?

A. Correct.

Q. As of today, is that Microsoft's official position?

A. Yes.

Q. As of today, is it Microsoft's position that it is inappropriate for standards-essential patent holders to seek injunctive-style relief?

A. Yes.

Q. That position is directly contrary to the position taken at Page 13 of the June 2011 Federal Trade Commission letter we discussed a moment ago, correct?

A. Our position changed from June 14th to more recently, yes.

Q. Why did Microsoft's position change?

A. Based on experience since then, based on thinking about the subject more deeply, and based on discussions with the US Department of Justice.

Q. When you say "based on our experience since then," are you referring to your experience as, for example, a defendant against the Motorola entities?

A. Yes.

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1 DAVID A. HEINER
2 Q. Do you recall whether you have seen these
3 documents before?
4 A. I don't think I have. I'm not certain.
5 Q. You can set them aside.
6 A. Okay.
7 (Whereupon, a 3-page Interoperability: The other
8 Side of Our Settlement with the European Commission document
9 was marked Exhibit 11 for identification.)
10 THE COURT REPORTER: Exhibit 11.
11 BY MR. SCHOENHARD:
12 Q. Mr. Heiner, you've been handed a document that has
13 been marked as Heiner Exhibit 11.
14 Please take a moment to review this document and
15 tell me whether you recognize it.
16 A. (Witness peruses document.)
17 Okay.
18 Q. Do you recognize this document?
19 A. Yes.
20 Q. What is Heiner Exhibit 11?
21 A. It appears to be a printout of a blog post that I
22 did apparently on December 18th of 2009.
23 Q. To what does the blog post marked as Heiner
24 Exhibit 11 relate?
25 A. It relates to a settlement of inquiries made by

1 DAVID A. HEINER
2 the European Commission regarding interoperability.
3 Q. What is interoperability?
4 A. That's another one of those \$64,000 questions.
5 But generally it's the ability of two products to -- at
6 least in the computer context, two products to exchange
7 information and interact with one another.
8 Q. And in connection with the European Commission's
9 investigation, were there concerns about the availability of
10 interoperability with Microsoft products?
11 A. Yes.
12 Q. As part of this and other investigations,
13 Microsoft created a set of principles regarding
14 interoperability that it intends to follow, correct? Do you
15 have any responsibility for the principles of
16 interoperability at Microsoft?
17 A. Yes.
18 Q. What is that responsibility?
19 A. The responsibility is counseling clients with
20 respect to living up to those principles.
21 Q. And when you say "counseling clients," you're
22 referring to clients within Microsoft, correct?
23 A. Yes.
24 (Whereupon, a 4-page Frequently Asked Questions
25 about Interoperability document was marked Exhibit 12 for

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1 DAVID A. HEINER
2 identification.)
3 THE COURT REPORTER: Exhibit 12.
4 BY MR. SCHOENHARD:
5 Q. Mr. Heiner, you've been handed a document that has
6 been marked as Heiner Exhibit 12, bearing Production Nos.
7 MOTOM_WASH1823_0394353 through 356. Please take a moment to
8 review this document and tell me whether you recognize it.
9 A. (Witness peruses document.)
10 I see it appears to be a printout of a Microsoft
11 website relating to the interoperability principles we
12 announced. I don't specifically recall the document.
13 (Whereupon, a 3-page Microsoft Open Specifications
14 document was marked Exhibit 13 for identification.)
15 BY MR. SCHOENHARD:
16 Q. Mr. Heiner, you've been handed a document marked
17 as Heiner Exhibit 13 which bears Production Nos.
18 MOTM_WASH1823_0394414 through 416.
19 Please take a moment to review this document and
20 tell me whether you recognize it.
21 A. Yes. I recognize this document to be a printout
22 from the Microsoft website of the interoperability
23 principles that Microsoft articulated.
24 Q. Are you familiar with the set of interoperability
25 principles reflected in Exhibit 13?

1 DAVID A. HEINER
2 A. Yes.
3 Q. One of the interoperability principles is
4 identified with the numeral 4 at the bottom of the page
5 carrying over to the second page of the bottom, "RAND Patent
6 Terms."
7 Do you see that?
8 A. Yes.
9 Q. As one of Microsoft's interoperability principles,
10 Microsoft has committed to provide licenses to certain of
11 its patents covering Microsoft open protocols on reasonable
12 and nondiscriminatory terms, correct?
13 A. Yes.
14 Q. Is the term "RAND" with respect to reasonable and
15 nondiscriminatory licensing terms, as used in the context of
16 Microsoft's interoperability principles, substantially the
17 same, in your view, as RAND is understood in these standards
18 context?
19 A. I'm not sure about that. You know, here we're
20 talking about making available proprietary technologies.
21 And in the standard-setting context, you know, we're talking
22 about firms coming together to contribute technology which
23 may come from many different places into one standard and
24 then that standard being one of many that gets implemented
25 in products.

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1 DAVID A. HEINER
 2 BY MR. SCHOENHARD:
 3 Q. Mr. Heiner, are you aware of any time prior to the
 4 fall of 2011 at which Microsoft took the position that
 5 injunctive relief should not be available to standard-
 6 essential patent holders?
 7 MR. HARRIGAN: Object to the form of the question.
 8 THE WITNESS: No.
 9 MR. SCHOENHARD: Mr. Heiner, I don't believe I have
 10 anything further. I thank you very much for your time this
 11 morning.
 12 THE WITNESS: Okay. Thank you.
 13 THE COURT REPORTER: Any questions?
 14 MR. HARRIGAN: Nope.
 15 THE VIDEOGRAPHER: Here marks the end of videotape
 16 labeled No. 2 in the deposition of David Heiner.
 17 The time is approximately 11:56 a.m. We are off
 18 the record.
 19 THE COURT REPORTER: And before I go off the
 20 record, would you like the standing order?
 21 MR. SCHOENHARD: Please.
 22 THE COURT REPORTER: And would you like a copy,
 23 standing order?
 24 //
 25 CONTINUED ON THE NEXT PAGE TO INCLUDE JURAT.

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1 CERTIFICATE
 2
 3 I, Tia B. Reidt, do hereby certify that
 4 pursuant to the Rules of Civil Procedure, the witness
 5 named herein appeared before me at the time and place
 6 set forth in the caption herein; that at the said time
 7 and place, I reported in stenotype all testimony
 8 adduced and other oral proceedings had in the
 9 foregoing matter; and that the foregoing transcript
 10 pages constitute a full, true and correct record of
 11 such testimony adduced and oral proceeding had and
 12 of the whole thereof.
 13
 14 IN WITNESS HEREOF, I have hereunto set my hand
 15 this 9th day of April, 2012.
 16
 17
 18
 19
 20 Tia B. Reidt
 21
 22 Commission Expiration: June 3, 2014
 23
 24
 25

1 DAVID A. HEINER
 2 MR. HARRIGAN: Yeah.
 3 THE COURT REPORTER: Thank you.
 4 (Whereupon, the deposition was concluded at
 5 11:59 a.m.)
 6
 7 (Signature waived.)
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1 CORRECTION SHEET
 2 Deposition of: David Heiner Date: 03/28/12
 3 Regarding: Microsoft Vs. Motorola
 4 Reporter: Tia Reidt
 5
 6 Please make all corrections, changes or clarifications
 7 to your testimony on this sheet, showing page and line
 8 number. If there are no changes, write "none" across
 9 the page. Sign this sheet on the line provided.
 10 Page Line Reason for Change
 11 _____
 12 _____
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 22 _____
 23 _____
 24 Signature _____
 25 David Heiner